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No. 85-1540

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN CHRISTOPHER PRACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the government improperly withheld exculpatory material.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count 1); importation of more than 1,000 pounds of marijuana, in violation of 21 U.S.C. 952 (Count 2); and possession of more than 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 3). He was sentenced to concurrent terms of five years' imprisonment on Count 1, five years' imprisonment and a two-year special parole term on Count 2, and 10 years' imprisonment on Count 3. The court of appeals affirmed (Pet. App. A2-A4).

The evidence at trial revealed that petitioner was one of the founders and prime participants in a scheme to smuggle large quantities of marijuana into Florida and South Carolina. Petitioner participated in this scheme with a drug dealer named A.D. Griffith, as well as with a number of other co-conspirators. 1 Tr. 60-61, 144-145, 154-155; 2 Tr. 9-12, 16-22, 22-33, 38-40, 143-144. Four of these co-conspirators ultimately agreed to cooperate with the government; with their aid, as the court of appeals put it, "the prosecution presented an overwhelming case against [petitioner]" (Pet. App. A3).

Prior to trial, petitioner had requested the disclosure, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), of exculpatory materials in the possession of the prosecution, including materials relating to the possible use by the government of a confidential informant (Pet. 22-23). While the government provided certain discovery materials to petitioner (*id.* at 23), the prosecution explained that it had obtained no information from any informants in this case. After his conviction, petitioner moved for a new trial, stating his belief that Griffith had served as an informant and asserting that the government improperly had failed to disclose that fact. The government responded that petitioner had failed to establish the existence of an informant, and it assured both the district court and the court of appeals that there was in fact "no informant in this case" (Gov't C.A. Br. 17; see *id.* at 18). The district court denied petitioner's motion without opinion (Pet. App. A31-A34); the court of appeals affirmed in an unpublished order, finding petitioner's *Brady* contention "meritless" (*id.* at A4).

2. Petitioner's sole contention before this Court is a factual one: that the government made use of a confidential informant and improperly withheld his name from the defense (Pet. 34-54). This argument is entirely without merit, however, because petitioner has failed to point to any

reason to believe that such an informant in fact existed. While petitioner spends considerable time speculating that the government would not have begun its investigation without an informant (Pet. 37-40), that speculation is unsupported by anything in the record; to the contrary, the government explained to the satisfaction of the courts below that no informant existed and that no evidence was withheld from petitioner. The conclusion reached by both courts below on this factual question does not warrant further review.

Petitioner also states that, pursuant to the Freedom of Information Act, 5 U.S.C. 552, he has received a Federal Bureau of Investigation report concerning the investigation in this case. Because a portion of the report was withheld under 5 U.S.C. 552(b)(7)(D), which exempts from disclosure law enforcement records provided by a "confidential source," petitioner asserts that an undercover informant must have existed (Pet. 33, 41-42). Section 552(b)(7)(~~6~~)(D), however, reaches not only information provided by undercover operatives, but also data provided by other law enforcement agencies or by private citizens. See, *e.g.*, *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 209 (7th Cir. 1985); *Johnson* v. *Department of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984). The FBI report on its face thus provides no support for petitioner's assertion, and it does not in any way undercut the government's consistent representation that no informant was used in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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